JAMS ARBITRATION

ROBERT GOLLNICK, Claimant, vs. UBER TECHNOLOGIES, INC, LP, RAISER, LLC-CA, LLC, AND DOES 1-20, INCLUSIVE, Respondents.	JAMS Reference No.: 1100082777 FINAL AWARD

Introduction

This arbitration presents the question as to whether the Claimant is an employee of one or more of the Respondents[1] under California law. California law

[1] The various Respondent entities are lumped together in the parties' briefing and in this Decision as "Uber." In light of the decision here, it is not necessary to discuss which entity would be the "employer" of Mr. Gollnick had that result occurred.

on this question includes a presumption of employment status where a worker provides services "for the benefit of" the putative employer. If not, then the would-be employee has the burden of proving that he/she should be deemed to be an employee under the applicable standards.

Here, Mr. Gollnick failed to demonstrate the factual predicate required to invoke California's presumption of employment status. Thus, it was his burden to prove he was an employee of Uber under applicable standards. Mr. Gollnick failed to present sufficient evidence to meet that burden of proof. Accordingly, he will take nothing by his action here.

I. Does the Labor Code Sec. 3357 Presumption of Employment Apply Here?

California Labor Code Sec. 3357 ("§3357") provides:

> Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.

The presumption created by §3357 is somewhat circuitous in that it does not apply where a worker is an independent contractor, in which case the worker is not an employee. There is a scant of case authority to resolve this seemingly tautological presumption, but sense can be made by looking at the relevant authorities.

Yellow Cab Cooperative, Inc. v. Workers Comp. Appeals Board (1991) 226 Cal. App. 3d 1288 interpreted the applicability of the §3357 presumption. There, Yellow Cab had previously been a traditional taxicab business which provided rider services to the general public. Yellow Cab's drivers had been unionized employees.

In 1976, Yellow Cab went into bankruptcy. While the opinion does not provide explicit detail as to what transpired in the bankruptcy proceeding, it appears that the Debtor restructured its business and created a "division" called Yellow Leasing Co. ("YLC"). YLC's business model was to own cars outfitted as taxis and leased them to drivers. The taxis were all painted yellow and essentially looked the same as they had before the bankruptcy. The lease agreement appeared designed to establish that the lessee-driver would not be an employee of the lessor but rather would use a vehicle for ten hour shifts for a fixed price upon the following terms (among others):

- The lease would automatically be renewed at the end of each week.
- The lease could be terminated by either party upon prior notice or cancelled for breach without notice.
- The driver was not required to provide any service to the lessor.
- There was no employment relationship between lessor and lessee and the lessee would be a "self-employed person…free from authority and control of LEASING COMPANY".
- The lessee was not worker for workers' compensation insurance purposes.
- Once the lessee took possession of the taxicab, he or she would exercise complete discretion in its operation and did not have to use any taxi stand, answer radio calls or report the taxi's location.
- The lessee had to display a sign in or on the taxicab identifying the driver as self-employed.

In return, the lease provided that the lessor would provide telephone call and dispatch services, vehicle maintenance, liability insurance, and pay all license, taxes and fees for the taxicab.[2]

In evaluating whether the §3357 presumption applied under this arrangement, the Court first analyzed the statutory requirement that the work be performed "for another." That is, whether YLC was in the business of "merely leasing taxicabs" or whether it was in the business of transporting the riders. It is emphasized that this issue was related to whether the §3357 presumption applied and not whether the driver was an employee or an independent contractor.

The Court recognized that §3357 is "somewhat tautological" for the reason described above, and stated that §3357 "is best understood as creating a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise." *Id.* at 1294. This straightforward statement of how the presumption applies is what Mr. Gollnick advocates here.

The problem with Mr. Gollnick's interpretation is that the Court in *Yellow Cab* did not apply such a straightforward understanding of §3357. Instead, it found that the Respondent (i.e., a driver) "had laid the factual predicate for the application of the § 3357 presumption." *Id.* That factual predicate consisted of evidence that YLC did not simply collect rent, but cultivated the passenger market by soliciting riders, distinctively painting and marking the cabs, and concerning itself with "various matters unrelated to the lessor-lessee relationship." These other

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[2] The opinion is less than precise as to the name of the Yellow Cab entity or entities involved in the restructured business. YLC is clearly the lessor, but according to the opinion "Yellow Cab" provided the services. In other portions of the opinion, "Yellow" is used. It is assumed that these differences are not significant here and that the lessor is the same entity operating throughout the opinion.

matters included instructing drivers in "service" and "courtesy" and other behavioral standards. The Court also said that "we follow courts elsewhere in holding that Yellow's enterprise consists of operating a fleet of cabs for public carriage" citing opinions from other states.[3]

Thus, the Court found the §3357 presumption applied because the driver in its case had presented sufficient evidence to conclude that YLS was in the business of providing transportation services for riders. In other words, for the presumption to apply, the services of the claimant had to be directed to the business of the putative employer.

In *Jones v. Workers' Comp. Appeals Bd.,* (1971) 20 Cal. App 3d 124, Mr. Jones was an employee of Phillips Petroleum Company and was also a member of a labor union. He was designated as a picket captain by the union during a strike against Phillips and was injured while on the picket line when he was run over by an oil truck. He sought workers' compensation benefits from his union, which he claimed was his employer when he was injured. He also invoked the §3357 presumption upon the argument that he was furthering the union's business when injured. The Court agreed after finding that Mr. Jones had made the predicate showing that he had satisfied the working "for another" prerequisite by actively picketing at the time of injury, thus benefitting the union's business of furthering the interests of its members. *Id.* at 128. Hence, the presumption applied to him.

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[3] These citations are puzzling in that there is no indication that the taxicab business in these other states was being conducted by the same or even a related entity was before the Court or that these non-Yellow Cab companies used a business model in any way similar to that of YLC. *See Central Management v. Industrial Comm'n* (1989) 162 Ariz. 187 and *Globe Cab Co. v. Industrial Commission* (1981) 86 Ill. 2d. 356.

In *Ware v. Workers' Comp. Appeals Bd.* (1999) 78 Cal. App 4th 508, caddies at the Bel-Air Country Club claimed that they were employees and not independent contractors. The court found that "...since caddies were provided by the Club for its members, caddying is an integral part of the Club's business. Thus, Ware [the Petitioner caddie] provided services which also benefitted the Club, and employment is presumed. (§3357)" *Id.* at 515. While not thoroughly explained, this quote is reasonably read as dealing with the "for another" prerequisite to the presumption.

Finally, in *Bain v. Tax Reducers, Inc.* (2013) 219 Cal. App 4th 110, the Court considered whether the trial court erred in finding that the requisite predicate for applying the §3357 presumption, but found that it did not matter because Bain's evidence satisfied his burden of proof without the presumption anyway.

Accordingly, the question here becomes did Mr. Gollnick lay a sufficient factual predicate for the application of the §3357 presumption?

Mr. Gollnick asserts that he has laid his factual predicate because the evidence has established that Uber registered as a Transportation Network Company ("TNC"), which is defined under California Public Utilities Code §543 as "an entity operating in California that provides prearranged transportation services for compensation using an internet-enabled application or platform to connect passengers with drivers using a personal vehicle." Mr. Gollnick also argues that his evidence established that the CPUC had issued orders that TNCs provide passenger transportation services for compensation and that as a TNC, Uber could only transport passengers using drivers' personal vehicles. The evidence did establish these facts.

These facts, however, did not lay a sufficient factual predicate to establish that Uber is in the passenger transportation business. Mr. Gollnick provided no

evidence or authority that registration as a TNC establishes that the registrant is indeed operating as a TNC, or that registration is an admission of operating as a TNC, or any other basis for concluding that Uber had operated as a TNC during the relevant period here. There was no evidence sufficient to establish why Uber registered as a TNC. Further, the CPUC orders submitted by Mr. Gollnick offer no support regarding the §3357 presumption. Exhibit 91 says only that TNCs are providing passenger services for compensation, and Exhibit 91 says that as a TNC, Uber can only transport passengers using drivers' vehicles. Both beg the question as to whether Uber was in fact transporting passengers so as to be covered by those orders.

Also, Mr. Gollnick did not provide any governing authority as to whether CPUC orders have any binding effect on this case. In *Yamaha Corp. of America v. State Bd.* of *Equalization* (1998) 19 Cal. 4th 1 upon which Mr. Gollnick relies, the Court defined its issue: "[t]he question presented is what legal effect courts must give to the Board [of Equalization]'s annotations when they are relied on as supporting its position in taxpayer litigation." [4] *Yamaha* has nothing to do with rules of the CPUC.

Mr. Gollnick also offered evidence that under his agreement with Uber, only he could drive using Uber's software. This evidence does not lay a foundation sufficient to invoke the §3357 presumption. Uber's prohibition on drivers from sharing their software licenses has no logical connection to Uber being in the passenger transportation business. For present purposes, this anti-sharing provision is best interpreted to support Uber's contention that it is in the business of licensing

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[4] "Annotations" are summaries of State Board of Equalization opinions generated by the Board's attorneys and made available for publication.

software. It is obvious that Uber limits sharing of that software by licensees so that it can sell more licenses.

Thus, Mr. Gollnick has not laid a sufficient foundation to invoke the §3357 presumption. Accordingly, he has the burden of proof to establish his claimed employment relationship with Uber.

II. Did Mr. Gollnick Meet His Burden of Proof?

Since the presumption of employment does not apply to Mr. Gollnick, it is his burden to proof that his relationship with Uber is one of employer/employee. The parties virtually agree to the standard for resolving whether a worker is an independent contractor as opposed to an employee. The analysis starts Labor Code §3353, which defines an independent contractor as "any person who renders service for a specified recompense for a specific result, under the control of his principal as the result of his work only and not as to the means by which the result is accomplished." All other workers are employees. Labor Code §3351.

Using these definitions, the courts have consistently held that the most important factor in determining the nature of the working relationship is the right to control the manner and means of accomplishing the result of the services arrangement. *Empire Star Mines Co. v. Cal. Emp. Com. ("Empire")* (1946) 28 Cal. 2d. 33, 43-44). Each service arrangement must be evaluated own its facts, and the dispositive circumstances may vary from case to case. *S.G. Borello & Sons, Inc. v. Department of Industrial* Relations (1989) 48 Cal. 3d. 341 (*"Borello"*). Accordingly, a litany of "secondary elements" has developed in the cases, some seemingly more related to the control factor and some less so. These secondary elements have included (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation with reference to whether in the locality, the work is usually done under the direction of the principal

or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by time or by the job; (g) whether or not the work is part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. *Empire* at 43-44; *see,* Rest. 2d Agency, sec. 220.

These factors apply to the facts presented by Mr. Gollnick as to his experience and that of other drivers[5] in this case as follows. First is the question of control of the methods and means as to how the result of the services arrangement is to be accomplished. It is axiomatic that it must initially be determined what the desired result of the services arrangement between Mr. Gollnick and Uber was. It appears clear that from Uber's perspective, the desired result is to have drivers willing and available to get a person who has contacted Uber seeking to be driven from one place to another into a vehicle for that purpose. There was nothing presented into evidence to suggest that Uber's purpose was to get the person into a particular vehicle, including Mr. Gollnick's. This means that there had to be a sufficient quantity of cars available to handle passengers as they appeared for transport. The evidence from Mr. Gollnick was that Uber did not control which cars would be available in what places and times. That is, there was no evidence that drivers had assigned routes or designated areas of operation. Mr. Gollnick and

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[5] The repeated references to the experiences of other drivers covered by Mr. Gollnick's evidence is in recognition that the law looks to how much control the hirer retains the right to exercise, not just how much control is exercised. *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522, 533.

his witnesses presented evidence that did show that from time to time Uber suggested to drivers that they locate in a particular geographical area or a special event so that there would be a sufficient pool of cars available to handle an anticipated surge in business from that area or event. The drivers, however, were free to ignore such advice, and the testimony was that many drivers had their own systems for being in the right place at the right time.

A key reason that Uber did not control whether Mr. Gollnick's vehicle could be in the right place to answer requests for a ride was that Uber did not direct when Mr. Gollnick worked or when he did not. Mr. Gollnick's testimony was unequivocal that he worked when he wanted to and did not work when he did not want to. Thus, it cannot be said that Uber had any control over whether Mr. Gollnick or any other individual driver would be available to pick up people at a particular time or place.

Likewise, Mr. Gollnick testified that when he did work, he had unfettered discretion to drive around (or park and wait, for that matter) wherever he wanted. Sometimes he took suggestions from Uber as to where business might be brisker, sometimes he did not. Similarly, even when a ride was available on the Uber software program, he or other drivers rejected the prospective business for whatever reason deemed appropriate. These reasons included if a driver did not want to go where the prospective ride would take him or if he chose not to have the prospective passenger in his car.

Along the same lines, Mr. Gollnick testified drivers were free to drive for competitors of Uber such as Lyft. To be sure, drivers were prohibited from taking Uber leads from its software and transporting those passengers as a competitor's driver, but this restriction is simply common sense prohibiting a driver from redirecting business generated by the Uber system to a competitor. The fact that a

driver could drive for competitors is inconsistent with any finding of control by Uber as to where and how Mr. Gollnick was available for service to passengers using Uber.

Thus, Mr. Gollnick failed to establish that Uber had any control over when and where Mr. Gollnick or any other driver would be available to be part of the Uber cache of cars to handle requests for rides.

Control could also be shown as to how Mr. Gollnick was to exercise the methods and means of transporting riders once they got into his car. An obvious component of control is how much the driver would be paid for the trip. While the evidence showed that the Uber app attached a price for the trip, a driver could decide that he did not want to make that trip for that price. The driver was thus in control of how much he would accept to transport a particular passenger.

Another aspect of control of the actual trip could be the route by which the driver travelled to deliver the passenger. Here, Mr. Gollnick's evidence showed that drivers were not required to follow any particular route to deliver passengers but instead could go any way desired.

There were elements in Mr. Gollnick's evidence that might be seen as giving Uber some control over what happens while the passenger is aboard. These elements involve standards of courtesy, safety and the like which were disseminated by Uber through periodic communications. These standards may appear similar to those imposed by YLC in the Yellow Cab case discussed above, but they are not determinative and must simply be evaluated with the other evidence presented by Mr. Gollnick.

Another potential area where control by the principal might be found is in the tools needed to perform the subject work. The dominant tool for Uber drivers is the vehicle that is used to drive passengers. Mr. Gollnick purchased the car he used

for Uber passengers before he began working as an Uber driver. Uber had no say in what he had purchased, did not require him to buy a new car, and did not specify any color, equipment or other component unifying Gollnick's car with those of other Uber drivers. There was no evidence of such limitations for applicants who bought their cars in order to become an Uber driver. True, Mr. Gollnick did demonstrate that Uber cars had to post a sign bearing Uber's logo in a window of their otherwise non-descript vehicles. That requirement, however, is more logically viewed as evidence of business purpose (letting a passenger know which car to get into, advancing safety, and common sense) than as the kind of meaningful control over vehicle appearance present in other cases, such as a bright yellow vehicle marked prominently as a "Yellow Cab."

Along this line, Mr. Gollnick testified that he could drive his car whenever and wherever he wanted when it was not being used with an Uber passenger. It was his car, of his choosing, and looked like whatever he wanted it to rather than, say, a commercial vehicle. Mr. Gollnick could use his car when he was off duty for whatever purpose he wanted. In doing so, he was not, for example, driving his family around in a bright yellow taxi.

The other significant tool used by the drivers is the Uber app, which is licensed and not provided for free by Uber. It is paid for by the drivers as they reap profits from its use.

Mr. Gollnick also relies heavily on his evidence that his relationship with Uber was terminable at will. Citing *Borello*, he argues that this fact is "strong evidence in support of an employment relationship." Maybe such is true in some contexts. Nonetheless, while many employees are terminable at will (although some employees may have employment contracts providing for the contrary), this does not mean that if a worker is terminable at will, then that worker is an

employee. And while the Supreme Court in *Ayala v. Antelope Valley Newspapers, Inc., supra,* 59 Cal. 4th at 531, n.2 did say "[a]n employee may quit, but an independent contractor is legally obligated to complete his contract," if that contract provides that either party may terminate the working relationship at will, as is the case with the Uber contract, then the independent contractor and an employee are not distinguishable on this point.

Mr. Gollnick also argues that "secondary factors" from *Borello* support the position that the drivers are employees. First, is whether the work constitutes a distinct occupation or business. Mr. Gollnick quotes Uber's self-characterization as "everyone's private driver" and similar articulations as evidence that Uber is in the transportation business. The syllogism offered is "Uber is in the business of transporting people [because it has said so]. Gollnick transported some of those people for Uber. There is no distinction between Gollnick's driving and Uber's business of transporting people, thus he must be an employee." Robert Gollnick's Closing Brief dated March 13, 2017 ("Gollnick's C.B"), p. 15, lines 20-23. This logic is a far cry from Socrates being a man because he is mortal. Mr. Gollnick offers no authority that the implied proposition that Uber's self-characterizations are binding here, and there is no evidentiary support for the assertion that there is no distinction between Mr. Gollnick's driving and Uber's supposed business of transporting people. The most obvious failure of evidence on this point is that it was not shown that Uber workers who are admittedly employees drive passengers.

The next "secondary factor" is whether the worker performs under supervision. Mr. Gollnick admits that drivers tend not to be supervised because supervisors usually do not ride around with their underling drivers. This is likely so. Uber does track driver performance through a star-rating system and can by contract terminate those whose performance is not up to snuff. Mr. Gollnick,

however, did not demonstrate how this quality control system should be viewed as tantamount to direction by Uber of the drivers' means and methods of driving.

Mr. Gollnick asserts that because driving takes little skill, "this factor weighs heavily in favor of finding employee status." Gollnick's C.B., pg. 16, line 25- pg. 17, line 7. Perhaps the argument is simply that unskilled workers cannot independently contract to provide their unskilled services, but without some additional facts or authorities, this "secondary factor" offers no support on the employment question.

A *Borello* "secondary factor" with more substance in this case is whether the parties believe they have created an employer/employee relationship or an independent contractor arrangement. Here, Mr. Gollnick's evidence was more persuasive but not helpful to his position. Mr. Gollnick's testified that before signing on as a driver, he asked and was told by Uber that his relationship was would be one of an independent contractor to Uber. Consistently, his written driver's contract expressly provided that "the Parties intend this agreement to create the relationship of principal and independent contractor and not that of employer and employee" [Ex. 203]. This agreement should not be lightly disregarded in determining the employee v. independent contractor issue. *Mission Ins. Co. v. Workers' Compensation Appeals Bd.* (1981)123 Cal. App 3d 211, 226. Mr. Gollnick's explanation that he did not really read his driver's contract is not believable in light of his inquiry before joining Uber as to what his working status would be and his evidence that he received "1099" tax documentation rather than employee type tax information from Uber while he was working. Also persuasive was Mr. Gollnick's testimony that he tracked his business expenses for tax deductions in the manner he would as an independent contractor.

The other "secondary factors" from *Borello* as presented by Mr. Gollnick are not sufficient to overcome the conclusion that Mr. Gollnick did not demonstrate that the key determinate for establishing employment: that Uber exercised sufficient control over the methods and means of Mr. Gollnick's work as an Uber driver.

One additional non-*Borello* factor appeared in the cases which is worthy of mention. Virtually every case interpreting the Labor Code "control of work" factors did so in the context of a Workers' Compensation claim by an injured worker. These cases were decided under California's express policy to protect people who provide work to others and are injured in the process. How this policy manifests itself is expressly set forth in *Borello*:

> We agree that under the [California Workers' Compensation] Act, the "control of work" details test for determining whether a person rendering services to another is an "employee" or an excluded "independent contractor" must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the "history and fundamental purposes" of the statute.
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> The fundamental purposes of the Act are several. It seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guaranty prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries. *Borello, supra,* at 353-54.

In other words, the Supreme Court has directed that the interpretation of whether a worker is an employee or an independent contractor in the context of a Workers' Compensation case must take into account California's strong public policy quoted above. This means that any cases like *Borello,* which analyze the "right to control" standard and its concomitant "secondary factors" in the context

of a Workers' Compensation, must conduct their individualized factual analysis with reference to the strong public policy to protect workers who are injured in the service to others. Whether this approach results in a more liberal interpretation of "employee" in Workers' Compensation cases need not be determined here because any such impact would not help Mr. Gollnick in meeting his burden of proof in the context of this non-Worker's Compensation case.

It is also noted that the Arbitrator posed the question at final argument as to whether and how the Workers' Compensation "employee" cases should apply to this case. The matter was not resolved through responsive argument, and is not decided now.

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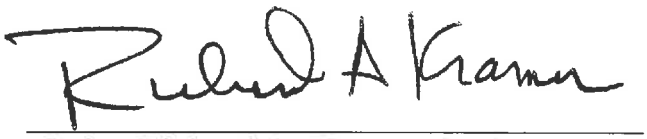
FINAL AWARD

Having failed to meet his burden of proof that he was an employee of Uber for the purposes of the claims asserted here, Claimant Robert Gollnick shall take nothing from his claims in this arbitration. This award resolves all issues presented for resolution in this arbitration.

Dated: August 17, 2017



Judge Richard A. Kramer (ret.)
Arbitrator